IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953 No. ~~819~~ 19

THEATRE ENTERPRISES, INC.,
Petitioner,

vs.

PARAMOUNT FILM DISTRIBUTING CORP.,
LOEW'S INCORPORATED,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX FILM CORPORATION,
UNIVERSAL FILM EXCHANGES, INC.,
UNITED ARTISTS CORPORATION,
WARNER BROS. PICTURES DISTRIBUTING CORP.,
WARNER BROS. CIRCUIT MANAGEMENT CORP.,
COLUMBIA PICTURES CORPORATION,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement of the Case

The petition in this case seeks review of a unanimous decision of the United States Court of Appeals for the Fourth Circuit (201 F.2d 306) affirming a jury verdict in favor of defendants. The case below was an action for damages alleged to have been inflicted on the plaintiff's

poorly located neighborhood Crest Theatre because of the defendants' allegedly conspiratorial action in refusing to license pictures for first-run exhibition in Baltimore in the Crest Theatre. Instead each defendant continued to license its pictures for first-run exhibition in Baltimore in large downtown first-run theatres. There are nine centrally located first-run downtown theatres in Baltimore, six of which are operated by exhibitors who do not have and never have had any affiliation with any of the defendants.

In *Bordonaro Bros. Theatres v. Paramount Pictures*, 176 F.2d 594 (C.A. 2, 1949) the Court stated (p. 596):

> "The central issue here, as in our recent case of Fifth and Walnut, Inc. v. Loew's Inc., 2 Cir., 176 F. 2d 587, is whether the admitted inability of plaintiffs to obtain first-run films for their theatre sprang from a conspiracy to exclude them from the first-run field or whether it was the natural result of independent business judgments as to the relative value of their exhibition facilities."

The above statement is equally true as to this case.

The statement of the "matter involved" on pages 2-22 of the Petition is neither fair nor accurate, nor does it even purport to be a complete summary of the evidence upon which the verdict for the defendants was based. It recites only that portion of the evidence which petitioner considers favorable, as if the trial court had disregarded that evidence and had directed a verdict for the defendants. Petitioner completely ignores the fact that the case was hotly contested on all basic factual issues. Both parties introduced a substantial body of evidence.

The plaintiff's President was its sole witness. His credibility was severely impeached. The defendants offered

nineteen witnesses whose testimony categorically denied conspiracy and fully explained the business reasons leading each defendant independently to act as it did. The trial court submitted to the jury the factual issues thus presented. The jury found in favor of each defendant. The Fourth Circuit Court of Appeals unanimously affirmed, saying at page 313 of 201 F.2d:

> "We think that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision."

The petitioner takes special issue with this holding. Its petition (page 16) states that the "petitioner in the present case contends that the Court of Appeals for the Fourth Circuit erred in affirming the trial judge's submission of the issue of conspiracy to the jury." It thus contends for the unusual proposition that a verdict should have been directed for the plaintiff on the issue of conspiracy in a case where the only basis for a finding of conspiracy would be inferences to be drawn from circumstantial evidence.

The opinion below summarized the evidence on behalf of the plaintiff and then set forth in summary form the testimony offered by the defendants. So it is not necessary to include in this brief any detailed statement of the facts.

In its brief before the Fourth Circuit, petitioner admitted that the policy of each defendant was to try, wherever it could, to license films distributed by it in the manner that would yield it the greatest return, and that each defendant acted on the idea that "playing first run in a theatre like the Crest located outside of the downtown section of Baltimore would not and could not be successful." Whether petitioner's inability to obtain pictures for first run ex-

hibition was the result of a conspiracy among the defendants, or the result of separate and independent exercise of business judgment in the selection of customers, was a typical jury question. The jury decided this issue in favor of the defendants.

Petitioner argues that unless this case is reversed neighborhood theatres everywhere are doomed to a subsequent-run status. This case stands for no such doctrine. The jury in this case simply decided on the evidence that in the single City of Baltimore, the action of these defendants in preferring to license their pictures for first-run exhibition in centrally located downtown theatres, in preference to the petitioner's poorly located neighborhood Crest Theatre, was the result of independent judgment in solving a common business problem.

Petitioner's statement (page 6) that the twelve points, which it has carefully excised from the evidence, were "accepted" by the Court of Appeals in its opinion is simply not correct. What the opinion below did was to summarize the evidence offered by both parties and to hold that the factual issues had been properly submitted to the jury. It was the jury which "accepted" the evidence introduced by the defendants.

I.

The Fourth Circuit Court of Appeals Correctly Approved The Submission of the Factual Issue of Conspiracy to the Jury.

Petitioner cites no case in which any court has directed a jury verdict for plaintiff in a case under the anti-trust laws. The only decision on this point in a motion picture case is in accord with the decision below. In *Fifth and Walnut, Inc., et al v. Loew's, Inc., et al*, 178 F.2d 587 (C.A.

2, 1949) cert. den. 338 U. S. 894 (1950), reh. den. 338 U. S. 940 (1950) plaintiff had charged that the defendants had conspired in violation of the anti-trust laws to deny first run to plaintiff's theatre in Louisville, Ky. The case was submitted to the jury and from a verdict in favor of defendants an appeal was taken. In affirming, the Court said (p. 590):

> "It is of the essence of plaintiff's argument that 'but for the fact that a Jury had to pass upon the question of damages,' a directed verdict would have been required. This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. Obviously what the plaintiffs are doing is to confuse evidence of conspiracy, to be evaluated by the jury, with demonstrated proof, to be accepted as final by the Court."

In attempting to create the appearance of a conflict between circuits, petitioner relies upon three Third Circuit non-jury cases: *William Goldman Theatres v. Loew's, Inc.*, 54 F. Supp. 1011 (D.C.E.D. Pa., 1944) rev'd., 150 F.2d 738 (C.C.A. 3, 1945); *Ball v. Paramount Pictures*, 67 F. Supp. 1 (D.C.W.D. Pa., 1946) rev'd. 169 F.2d 317 (C.C.A. 3, 1948); and *Milgram v. Loew's, Inc., et al.*, 94 F. Supp. 416 (D.C.E.D. Pa., 1950) aff'd. 192 F.2d 579 (C.A. 3, 1951). There is absolutely no justification for petitioner's statement that these non-jury cases are in conflict with the decision below.

It should be noted that Chief Judge Parker who sat in the Circuit Court of Appeals for the Third Circuit in the *Goldman* case, had submitted to him in the instant case, and with his colleagues unanimously rejected, the very argument now being made by petitioner as to the meaning of the Third Circuit cases.

In each of the three cases relied upon by petitioner the Court, *sitting without a jury*, was called upon to determine whether or not the evidence introduced supported a finding of fact as to the existence of conspiracy. These cases were considered by the court below and it determined that no one of these cases is in conflict with its opinion. These cases do not hold that certain conduct is equated with conspiracy. This is clearly demonstrated by the decision in the last of the three cases relied upon by petitioner, the *Milgram* case, where the Court of Appeals said (182 F.2d at p. 583):

> "An experienced trial judge has heard the evidence and passed upon the credibility of the witnesses in this case; his conclusion is that an inference of joint action on the part of the distributors is warranted. The sole question now before us on this appeal is whether the trial judge's *findings of fact* are clearly erroneous." (Emphasis supplied).

Petitioner was not entitled to a directed verdict on the conspiracy issue. It was, at most, only entitled to have the fact issue of whether a conspiracy existed decided by the jury. This was done. Petitioner's assertion of error is devoid of merit. There is no conflict between the opinion below and any decision of any other Court of Appeals as to the necessity of submitting the issue of the existence of a conspiracy to the trier of fact.

II.

There was no Error in the Charge as to the Paramount Case.

The only other point stressed by petitioner is that the trial judge did not properly instruct as to the effect of the decrees entered in *United States v. Paramount Pictures*, 334 U. S. 131 (1948) (hereinafter referred to as the *Para-*

mount case) excerpts from which decrees, as offered by petitioner, were received in evidence. Here again petitioner is far from candid in its statements as to the charge given, and entirely omits reference to the circumstances surrounding the giving of the instructions.

First: The record in the *Paramount* case was never made available to the trial judge. Nevertheless, the trial judge carefully analyzed the *Paramount* decisions to determine the issues decided, despite the facts that (a) nothing was decided in the *Paramount* case which related to Baltimore and (b) the *Paramount* case related to 1945 or prior thereto, whereas petitioner's theatre was not ready to open until February, 1949.

Second: The trial judge in his instructions, at the time the decrees were admitted and during the charge, reconstructed the *Paramount* case in the manner and to the extent that he deemed necessary to acquaint the jury with the issues determined in that case, insofar as they were applicable in the instant case. In so doing, the trial court exercised its judicial discretion in the light of facts and issues involved in the instant case. Petitioner apparently overlooks the following in *Enoch v. General Motors Corporation*, 340 U. S. 530 (1951) where this Court said (p. 571):

> "As to the manner in which such explanation should be made, no mechanical rule can be laid down to control the trial judge, who must take into account the circumstances of each case. He must be free to exercise 'a well-established range of judicial discretion'."

Third: Petitioner fails to set forth the true picture showing how the problem of the decrees was considered and handled by the trial judge. As soon as the opening state-

ments were concluded, petitioner's counsel offered in evidence certain decrees entered in *United States v. Paramount, et al.* (CA 38-9).* Objection was made to the admissibility of the decrees (CA 39-40) and, after full argument, the trial judge excluded the decrees but without prejudice to the right of petitioner to renew its offer (CA 210-17).

At the conclusion of all of the evidence there was a further hearing concerning the admissibility of the decrees. Prior to this hearing petitioner's counsel had submitted typewritten excerpts from the decrees (PX 97), merely setting forth four of the injunctive provisions, and petitioner's counsel said (CA 1362):

> "* * * These are the four things which we claim fit the present case directly within the issues that were raised and found in the Paramount case as to which these defendants have been enjoined."

The following colloquy took place at this hearing between Judge Coleman and petitioner's counsel (CA 1363-4):

> "(The Court) As I understand it, leaving out the exact words of the decree, you want to be able to argue to the jury as to putting in these decrees, that these parties were enjoined from doing the four things which you gave me on this special memorandum brief?
>
> "(Mr. Rome) That is correct, sir, as a result of there having been a finding they were violative of the Anti-trust laws, in the Paramount case they were enjoined from doing those things, and we would ask leave to say that to the jury."

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*("CA" refers to the Record in the Fourth Circuit Court of Appeals. Other page references are to the "Transcript of Record" in this Court.)

Before ruling that the excerpts of the decrees which petitioner had offered would be received in evidence, the trial judge stated petitioner's position and petitioner's counsel agreed. The following is the colloquy (CA 1400-1):

> "(The Court) * * *-Now, here, all Mr. Rome is asking is that I give to him the benefit of having the jury know that there was this decree, and that it is prima facie evidence.
>
> "(Mr. Watkins) But prima facie evidence of what, Your Honor?
>
> "(The Court) Prima facie evidence that these, — first, that the jury is entitled to know that these defendants have been restrained from doing certain things, and that among the things, the category of things that they were restrained from doing, was conspiring to institute clearances in restraint of trade. Mr. Rome contends that he can show, convince the jury that the clearance here is in that category of prohibitive clearances if he can show that there was conspiracy by concert of action in doing that. Isn't that in A, B, C, language what you are asking?
>
> "(Mr. Rome) Yes, sir."

Having resolved the argument in favor of petitioner, the Court instructed the jury, just prior to the closing of the evidence, as to the background of the decrees, and their effect as prima facie evidence (238-339). No exception was taken by petitioner. Petitioner's counsel then read to the jury his excerpts from the *Paramount* decrees (CA 1509-12).

Thereafter, the Court stated to counsel what it proposed to charge the jury with respect to the *Paramount* case (340-342). He asked if counsel wished to say anything but petitioner's counsel made no objection. This statement by the Court with respect to the *Paramount* case was repeated almost verbatim in the charge to the Jury (272a-274a).

Having stated that what he wanted was an opportunity to argue the injunctive provisions of the decrees to the jury, petitioner's counsel proceeded to make a lengthy argument based on those provisions (CA 1546-7; 1632-3; 1641-2; 1644; 1646; 1655-6).

The Trial Court considered the admissibility of the injunctive provisions of the *Paramount* decrees to be at best a "borderline" case (CA 1401). Following the clear ruling of this Court in the *Emich* case, the Trial Court exercised its judicial discretion in reconstructing the *Paramount* case for the jury. In so doing, the Trial Court relied on the statements made by petitioner's counsel and petitioner is in no position now to complain because the Court did so. The decision below that there was nothing detrimental to petitioner in the instructions on the *Paramount* decrees was clearly correct.

Petitioner asserts (petition, pp. 18-19) that the trial court failed to instruct that if the downtown first run theatres and the Crest Theatre were not in substantial competition, "then clearance between those theatres would be improper." Once again petitioner is guilty of extreme lack of candor. The fact of the matter is that the *only objection* made by petitioner to the court's charge with respect to substantial competition related to the inadvertent omission from the court's statement of plaintiff's claim, of the word "substantial" (280a-281a). The jury was recalled and this omission was rectified (280a). In addition, the Trial Court instructed that reasonable clearance is not a violation of the Anti-Trust laws, but that:

> "Where the clearance granted is unreasonable, in either time or extent, or where it is granted as part

> of an arbitrary system of clearances, or where it is granted for the purpose of suppressing competition, the granting of such a clearance becomes a violation of the Sherman Act * * *" (269a).

Further, petitioner argues that the trial court told the jury that Loew's and Warner's had the "unqualified" or "absolute" legal right to do with their pictures what they chose (petition, pp. 18 and 19). What the court actually said was that Loew's and Warner's had a legal right to show their own pictures in their own theatres, as and when they saw fit, and to prefer their own theatres as customers, and that the action of each in so doing was not, "*in and of itself*", proof of any conspiracy or any illegal action (271a). This instruction followed the provisions of Paragraph 5 of the decree entered in the *Paramount* case against Loew's and Warner, as offered in evidence and read to the jury by appellant* (CA 1512). *Dipson Theatre, Inc. v. Buffalo Theatres, Inc.*, 190 F.2d 951 (C.A. 2, 1951) cert. den. 342 U. S. 926 (1952) also supports this instruction.

The last argument made by petitioner is equally lacking in merit. Petitioner urges that the instruction concerning the burden of proof respecting clearance was improper. There was no error and the argument by petitioner comes with ill grace for: (I) Petitioner reserved no exception to the language used; (II) Petitioner was not attacking clearance provisions in Baltimore, — had it secured the run it

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* "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries."

wanted, it would have expected to receive the existing clearances; (iii) The defendants proved that substantial competition existed between petitioner's theatre and the downtown theatres. There were in evidence in this case actual surveys which conclusively demonstrated the fact of substantial competition. They confirmed the opinions of respondents' witnesses and refuted the unsupported opinion of petitioner's only witness.

The balance of the Petition consists of completely unsupported statements that if the decision below is permitted to stand the respondents will be able to circumvent the injunctive provisions of the decrees in the *Paramount* case. This case and the *Paramount* case bear no factual similarity. In the case below, petitioner conceded that no conspiracy existed between the defendants and any of the independent exhibitors operating six of the nine first-run theatres in Baltimore or any of the exhibitors operating subsequent run theatres in Baltimore (CA 1232). During the three years preceding the institution of this suit, sixty-three percent of the first-run exhibitions in Baltimore were held in independent theatres.

The good faith of petitioner's few offers for specific first run pictures was completely discredited by the Court of Appeals (201 F.2d at p. 311).

Petitioner's theatre was a neighborhood theatre built to round out a neighborhood shopping center, and no consideration had been given to building the theatre at that location "aside from being part of a general business development" (CA 1298). Petitioner's theatre was certainly no better structurally than, and not as well located as, other neighborhood theatres.

The facts involved in this case with respect to the purely local situation in Baltimore were fully developed before the jury and petitioner cross-examined defendants' witnesses as to their conduct and compliance with the decrees. The verdict of the jury, which heard the evidence and which saw the witnesses, was for the defendants.

CONCLUSION

For the foregoing reasons it is submitted that there is no occasion for this Court to exercise its power of supervision in this case to review a unanimous decision of the Court of Appeals affirming a jury verdict for the defendants. The petition for a writ of certiorari should be denied.

Respectfully,

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